

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>EDWIN CAMACHO</b>	)	
Claimant	)	
VS.	)	
	)	
<b>JOSE GUERRA and SUNFLOWER STATE EXTERIORS, LLC</b>	)	
Respondents	)	Docket No. 1,058,758
AND	)	
	)	
<b>INSURANCE COMPANY UNKNOWN and AMERICAN INTERSTATE INSURANCE COMPANY</b>	)	
Insurance Carriers	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

<b>EDWIN CAMACHO</b>	)	
Claimant	)	
VS.	)	
	)	
<b>JOSE GUERRA, ADAN GUERRA-LAGUNA and SUNFLOWER STATE EXTERIORS, LLC</b>	)	
Respondents	)	Docket No. 1,059,451
AND	)	
	)	
<b>INSURANCE COMPANY UNKNOWN and AMERICAN INTERSTATE INSURANCE COMPANY</b>	)	
Insurance Carriers	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER****STATEMENT OF THE CASE**

Respondent Sunflower State Exteriors, LLC, and its insurance carrier, American Interstate Insurance Company, appealed the June 25, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. Paul V. Dugan, Jr., of Wichita, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent Sunflower State Exteriors, LLC (Sunflower), and its insurance carrier, American Interstate Insurance Company (American Interstate). John C. Nodgaard of Wichita, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 21, 2013, preliminary hearing and claimant's exhibits thereto; the transcript of the March 7, 2013, preliminary hearing and exhibits thereto; the transcript of the May 1, 2012, preliminary hearing and exhibits thereto; the transcript of the April 18, 2012, deposition of claimant; the transcript of the January 17, 2012, deposition of Adan Guerra-Laguna and exhibits thereto; and all pleadings contained in the administrative file.

**ISSUES**

Claimant alleged two work-related injuries while working for respondent and filed applications for hearing in Docket Nos. 1,058,758 and 1,059,451. In Docket No. 1,058,758, claimant alleged that on November 5, 2011, he sustained a left foot injury at work from a fall off a roof. Claimant asserted his direct employer was Jose Guerra. In Docket No. 1,059,451, claimant alleged he sustained a back injury by repetitive trauma. The Workers Compensation Fund was impleaded in both claims. In a September 13, 2012, Order issued in Docket No. 1,058,758, ALJ Barnes made several findings, including that Sunflower was the statutory employer of claimant. That Order was appealed to the Board, which affirmed ALJ Barnes' findings in its December 19, 2012, Order.

In a September 13, 2012, Order in Docket No. 1,059,451, ALJ Barnes determined Sunflower was the statutory employer of claimant and that claimant gave timely notice of the injury by repetitive trauma, but the ALJ impliedly found that claimant failed to sustain his burden of proving a back injury by repetitive trauma arising out of and in the course of his employment. She specifically found claimant failed to provide any medical evidence regarding the repetitive nature of the alleged back injury. That Order was not appealed to the Board.

In an April 18, 2013, preliminary hearing Order in Docket No. 1,059,451, ALJ Barnes again determined Sunflower was the statutory employer of claimant and that claimant gave timely notice of the injury by repetitive trauma. She found that claimant's date of injury was November 5, 2011, the last day he worked for respondent, and she impliedly determined

claimant sustained a back injury by repetitive trauma arising out of and in the course of his employment with respondent. ALJ Barnes also impliedly found it was more likely than not that the prevailing factor for claimant's low back condition and need for medical care was his repetitive work-related activities, which were over and above claimant's routine activities of daily living. ALJ Barnes ordered respondent to provide the names of two treating physicians to claimant from which he could choose one to provide medical treatment. The ALJ also ordered temporary total disability benefits if the authorized treating physician took claimant off work.

Sunflower and American Interstate appealed the April 18, 2013, preliminary hearing Order to the Board and asserted: (1) Sunflower was not claimant's statutory employer, (2) claimant did not give timely notice and (3) claimant failed to prove his back injury by repetitive trauma arose out of his employment, as claimant did not prove his back injury by repetitive trauma by a diagnostic or clinical test. The Fund adopted Sunflower and American Interstate's arguments, except it took no position on whether Sunflower was a statutory employer. In a July 18, 2013, Order, the Board affirmed the April 18, 2013, preliminary hearing Order.

At a May 21, 2013, preliminary hearing, claimant requested that Sunflower and American Interstate be required to pay as an unauthorized medical expense \$450 for claimant's visit to Dr. George G. Flutter. Sunflower, American Interstate and the Fund raised the same defenses they asserted in Sunflower and American Interstate's appeal from the April 18, 2013, preliminary hearing Order. Claimant asks the Board to affirm the ALJ's order that Sunflower and American Interstate pay Dr. Flutter's \$450 bill as an unauthorized medical expense. The June 25, 2013, preliminary hearing Order indicated that although a preliminary hearing request was filed in both claims, claimant's preliminary hearing request was limited to Docket No. 1,059,451.

The issues are:

1. Was Sunflower a statutory employer of claimant?
2. What is claimant's alleged date of injury by repetitive trauma?
3. Did claimant provide timely notice of his alleged back injury by repetitive trauma?
4. Did claimant's alleged back injury by repetitive trauma arise out of and in the course of his employment? Specifically, did claimant meet his burden of establishing his alleged back injury by repetitive trauma by a diagnostic or clinical test?
5. Should Sunflower and American Interstate be ordered to pay Dr. Flutter's \$450 medical bill as an unauthorized medical expense?

**FINDINGS OF FACT**

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

The Board incorporates by reference herein the facts set forth in its July 18, 2013, Order. Claimant's brief testimony and the two exhibits made part of the record at the May 21, 2013, preliminary hearing were the only new evidence presented. The two exhibits were Dr. George G. Fluter's report and his corresponding \$450 invoice. Claimant was questioned briefly about his employment at TreeRific. He testified that he worked for TreeRific eight years earlier. When claimant was asked why TreeRific would have records showing he worked there between March 2012 and March 2013, claimant indicated that he did not know. Sunflower and American Interstate attempted to introduce a letter addressed to TreeRific that allegedly had handwritten notes from TreeRific answering questions posed in the letter, but the ALJ granted claimant's objection that the handwritten notes were hearsay and excluded the letter from the record.

**PRINCIPLES OF LAW AND ANALYSIS**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>1</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."<sup>2</sup>

With the exception of some additions and changes primarily on page three, Sunflower and American Interstate's brief is nearly identical to the one it filed in its appeal from the ALJ's April 18, 2013, preliminary hearing Order. The Fund's brief is identical to the one it filed in Sunflower and American Interstate's appeal of the April 18, 2013, preliminary hearing Order. The underlying issues raised by Sunflower and American Interstate on appeal are nearly identical to those it raised in the aforementioned appeal. The only new evidence presented at the May 21, 2013, preliminary hearing is that claimant, at some point in time, worked for TreeRific.

The additional evidence presented at the May 21, 2013, preliminary hearing does not convince this Board Member that the analysis and legal findings contained in the Board's July 18, 2013, Order should be overturned or modified. Claimant presented sufficient evidence to prove that he incurred an unauthorized medical expense of \$450 with

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<sup>1</sup> K.S.A. 2011 Supp. 44-501b(c).

<sup>2</sup> K.S.A. 2011 Supp. 44-508(h).

Dr. Flutter. The Board adopts the Principles of Law and Analysis contained in its July 18, 2013, Order and affirms the June 25, 2013, preliminary hearing Order of ALJ Barnes.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>3</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>4</sup>

### **CONCLUSION**

1. Sunflower was a statutory employer of claimant.
2. Claimant's date of injury by repetitive trauma was November 5, 2011.
3. Claimant provided timely notice of the injury by repetitive trauma to Jose.
4. Claimant's back injury by repetitive trauma arose out of and in the course of his employment. Specifically, claimant demonstrated through clinical testing that he sustained a back injury by repetitive trauma.
5. Sunflower and American Interstate are ordered to pay the outstanding medical bill from Dr. Flutter in the amount of \$450 as an unauthorized medical expense.

**WHEREFORE**, the undersigned Board Member affirms the June 25, 2013, Order entered by ALJ Barnes.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 2013.

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

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<sup>3</sup> K.S.A. 2011 Supp. 44-534a.

<sup>4</sup> K.S.A. 2012 Supp. 44-555c(k).

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Honorable Nelsonna Potts Barnes, Administrative Law Judge